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Supreme Court, U.S.
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NO. 93-939

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROY McGINNIS, ET AL.,
PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF

On December 1, 1993 the Congressionally Amended Federal Rules of Civil Procedure, Rule 4 became law. The new Federal Rules of Civil Procedure, Rule 4 as it relates to the consolidated Roy McGinnis and Peggy Musmeci cases reads as follows:

(i) Service upon the United States, and its agencies, corporations, or officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the attorney general of the United States at Washington, D.C., and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency. . .

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j) (1)...

Federal Rules of Civil Procedure, rule 4(i) (1) (A) (m) (effective December 1, 1993, reprinted at 113 S.Ct. 622, 630) 1993; see also notes of the Advisory Committee on Rules 113 S.Ct. 644 (1993) (new Rule 4 (i) (1) (A) "amends former

> subdivision (d) (4) to permit the United States attorney to be served by registered or certified mail"). Id. at 647 (new rule 4(m) "authorizes the court to relieve the plaintiff of the consequences of [failing to effect service withing 120 days]. . . even if there is no good cause shown").

Under the December, 1993 Federal Rule of Civil Procedure, Rule 4, the method of service used by Roy McGinnis and Peggy Musmeci (certified mail to the local United States attorney) would be adequate and effective. Furthermore, under the new Rule 4(m) a district court judge has greater discretion before dismissing a lawsuit because of a violation of the 120 day time limit for service. Prior to December 1, 1993 the judge had to dismiss the suit unless there was a good cause exception. The United States Attorney General in their Footnote No. 3, Page 8 and 9 of their opposition to the writ application concede that under the present law service on the United States in the Musmeci and McGinnis' cases would be effective.

Whether a congressional statute applies retroactively or prospectively has been broached by the United States Supreme Court in two cases - *Bradley v. School Board of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct.468, 102 L.Ed.2d 493 (1988).

The United States Supreme Court has previously

held in *Bradley v. School Board of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) that:

> One is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustive or there is a statutory direction or legislative history to the contrary.
>
> *Bradley, supra* at 416 U.S. 711, 94 S.Ct. 2016, 40 L.Ed.2d 476.

Under *Bradley* the Supreme Court recognized two exceptions to its retroactive application of Congressional Enactments.

> The presumption does not govern where (1) there is clear congressional intent to the contrary, or (2) retroactive application would result in 'manifest injustice'.
>
> *Id.* at 711, 94 S.Ct. at 2016.

In *Bowen* the Supreme Court stated:

> Retroactivity is not favored in the law. Thus, congressional, enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.
>
> *Id.* at 208-09, 109 S.Ct. at 471-72.

Those circuits applying *Bowen* and against retroac-

tivity are Fourth Circuit, *Leland v. Federal Ins. A.D. M.'R*, 934 F.2d 524 (4th Cir. 1991), the Eighth Circuit, *Simmons v. Lockheart*, 931 F.2d 1226 (8th Cir. 1991), the Tenth Circuit, *Devargas v. Mason and Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377 (10th Cir. 1990), cert. denied 111 S.Ct. 799, 112 L.Ed.2d 860 (1991), the District of Columbia, *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990) and the Federal Circuit, *Sargisson v. U.S.*, 913 F.2d 918 (1990).

Those circuits applying *Bradley* and favoring a retroactive application of congressional statutes include the First Circuit, *Aledo Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354 (1st Cir. 1989), the Seventh Circuit, *Federal Deposit Ins. Corp. v. Wright*, 942 F.2d 1089 (7th Cir. 1991); *Reliance Ins. Co. v. Zeigler*, 938 F.2d 781 (7th Cir. 1991), the Ninth Circuit, *Kruson v. International Telephone and Telegraph Corp.*, 872 F.2d 1416 (9th Cir. 1989) cert. denied 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990), and the Eleventh Circuit, *United States v. Peppertree Apts.*, 942 F.2d 1555 (11th Cir. 1991).

The *Bowen* analysis is distinguishable and not applicable in this case because in *Bowen* it involved an administrative regulation that attempted to retroactively effect the calculation of wage index for hospitals. The present case is not an administrative regulation but a congreessional statute. Also, as mentioned by Justice Scalia in *Kaiser Aluminum and Chemical Corp. v. Bonjourno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) the *Bradley* and *Bowen* decision could be logically distinguised in that *Bradley* applied in cases where judgment has been

rendered but the decision not yet final' whereas, *Bowen* would apply in all other cases. In the present case the judgment has been rendered but the decision is not yet final.

Under *Bradley* a review of the revised Federal Rule of Civil Procedure, Rule 4 and of the advisory notes and administrative and legislative history does not show that there is a clear congressional intent that the statute be applied prospectively. Therefore, we move to Rule of Construction No. 2 and ask whether the retroactive application of the new Federal Rule of Civil Procedure, Rule 4 would cause a manifest injustice in this case.

> A determination into whether retroactive application would result in manifest injustice requires the review of three factors:
>
> '(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.' *Id.* at 717, 94 S.Ct. 2019.
>
> *Joyner v. Monier Roof Tile, Inc.*, 784 F.Supp. 872, 878 (S.D. Fla. 1992).

The first factor is nature and identify of the parties. Claimants in the present case are two citizens of the United States and the United States Government. It is not between two private parties and does not involve private concerns. However, it is an issue of national concern in that it involves a citizen's right to have a rejection for benefits by the social security administration reviewed by a district court.

The second factor is whether the application of the new law "would infringe upon or deprive a person of a right that had matured or become unconditional". *Id.* 416 U.S. at 720, 94 S.Ct. at 2020. It has long been held that statutory changes which are remedial or procedural in nature apply retroactively while those that render substantive changes in the law apply prospectively.

> A law is 'substantive' if it creates rights, duties, and obligations, while a 'remedial' or 'procedural' law simply prescribes the methods of enforcement of those rights. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1445-46 (11th Cir. 1991).
>
> *Joyner, supra,* at 879.

The sections of Rule 4 that have been amended are merely procedural and they do not create any new rights. The United States Government has no substantial right that service be accomplished by mail as opposed to hand delivery. Nor does it have a substantial right to have a suit dismissed for failure to hand deliver the summons and complaint. Whereas, the plaintiffs, United States citizens do have a substantial right to have a decision of the Social Security Administration reviewed by the United States District Court.

The third factor is "whether a new and unanticipated obligation" would be imposed. *Bradley,* 461 U.S. at 720, 94 S.Ct. at 2020. The United States has no vested right in a previously existing remedial scheme for the manner of service. Applying the new Federal Rules of Civil Procedure,

Rule 4 to the parties in this case would not create any new liabilities that could not have been anticipated when the original suits were filed.

In short, there is no finding of manifest injustice by retroactively applying the revised Federal Rules of Civil Procedure, Rule 4.

In previous years when there have been amendements to the Federal Rules of Civil Procedure, Rule 4 the district courts have applied the new law retroactively. In *Gordon v. Hunt*, 116 F.R.D. 313 (S.D.N.Y. 1987) the court chose to apply the 1983 amendment to Federal Rules of Civil Procedure, Rule 4, imposing a 120 day time limit for service. The district court did this even though suit was filed before the effective date of the rule. Thus, they applied the rule retroactively. In *Benn v. Linden Crane Co.*, 370 F.Supp. 1269 (U.S.D.C.E.D. Penn. 1973) the district court recognized that service of process statutes are only procedural and do not create or affect individual substantive rights. Therefore, the court felt the procedural nature of the amended Federal Rule of Civil Procedure should have retroactive application. See also, *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537 (U.S.D.C. Hawaii 1965).

The law on service as it exists at the time this court considers this writ application is that plaintiffs' counsel's service by certified mail to the local United States attorney is effective and that the district judge has more discretion in not dismissing a suit for failure to comply with the 120 day service limit. Therefore, in these consolidated cases the writ should be granted and the matter remanded to the district court under the revised Federal Rules of Civil Procedure, Rule 4.

CONCLUSION

Under the *Bradley* test this Court should apply the revised Federal Rules of Civil Procedure, Rule 4 effective December 1, 1993 retroactively to the McGinnis and Musmeci cases. Amended Federal Rules of Civil Procedure, Rule 4 does not set forth that it should be applied only prospectively and there is no manifest injustice by applying it retroactively. At most, the United States would be inconvenienced by defending these cases.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Writ of Certiorari has been served upon the following named individuals by placing a copy of same in the U.S. Mail, postage prepaid, this 13th day of December, 1993.

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